No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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QUESTIONS PRESENTED

Under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. 901 *et seq.*, a worker engaged in maritime employment is entitled to compensation for a disability or death resulting from an injury occurring upon the navigable waters of the United States or adjoining area. Section 8(h) of the LHWCA, 33 U.S.C. 908(h), permits consideration of the future effects of a disability on wage-earning capacity in fixing an injured employee's compensation. Section 22 of the Act, 33 U.S.C. 922, authorizes any party to seek modification of a disability award "at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim." The questions presented are:

1. Whether, and under what circumstances, the Longshore Act authorizes a continuing award of nominal benefits to a claimant who has suffered a loss of long-term wage-earning capacity but who has no present loss of earnings.

2. If the Act authorizes such an award, whether the court of appeals properly ordered a continuing nominal award in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 81 F.3d 840. The opinion of this Court on a prior occasion is reported at 115 S. Ct. 2144. The earlier opinion of the court of appeals (Pet. App. 17a-20a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 21a-25a) and the administrative law judges (Pet. App. 26a-32a; App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing was denied on May 22, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on August 19, 1996, and was

granted on November 27, 1996. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

> The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 22 of the Longshore Act provides in relevant part as follows:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner,

> the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922.

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). For purposes of compensation, the Act classifies disability as either permanent total, temporary total, temporary partial or permanent partial disability. See 33 U.S.C. 908(a)-(c). For certain specified injuries resulting in permanent partial disability, incapacity to earn wages is conclusively presumed, and the claimant is entitled to compensation at the rate of 66 2/3% of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. 33 U.S.C. 908(c)(1)-(20) and (22). For "all other cases" of non-scheduled injuries involving permanent partial disability, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the

same employment or otherwise, payable during the continuance of partial disability." 33 U.S.C. 908(c)(21); see *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2148 (1995) (*Rambo I*).

Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases an OWCP district director (formerly called a deputy commissioner, see 20 C.F.R. 702.105) may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain a hearing before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C. 919(d); 20 C.F.R. 702.316, 702.331-702.351. An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c).

In the calculation of a permanent partial disability award under 33 U.S.C. 908(c)(21), a claimant's "wage-earning capacity * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). "[I]f [the claimant's] actual earnings do not fairly and reasonably represent his wage-earning capacity," however, the district director or ALJ "may, in the interest of justice, fix such wage-earning capacity as shall be reasonable." *Ibid.* In making that determination, the district director or ALJ may consider, *inter alia*, "the effect of disability as it may naturally extend into the future." *Ibid.* Thus, "the ultimate objective of this wage-earning formula is "to determine the wage that would have been paid in the

open labor market under normal employment conditions to claimant as injured." *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984) (citations omitted),

Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373. An order awarding or denying benefits may be modified either "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922. A request for modification may be made "at any time prior to one year after the date of the last payment of compensation." *Ibid.*

2. In 1980, Respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Com pany (Metropolitan). See *Rambo I*, 115 S. Ct. at 2146. Rambo filed a disability claim with the Department of Labor under the LHWCA. In 1983, an ALJ accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22 1/2% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22 1/2% of his average weekly wages of $534.38. *Rambo I*, 115 S. Ct. at 2146. Under Section 8(c)(21) of the LHWCA, Rambo therefore received an award of $80.16 per week, which represented 66 2/3% of "the difference between the average weekly wages [prior to his injury] of the [claimant] and the [claimant's] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See *Rambo I*, 115 S. Ct. at 2146. That award was made retroactive to November 16, 1981, with payments continuing thereafter indefinitely. App., *infra*, 4a. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks,

after which the Special Fund, which the Director of OWCP administers, became liable for the $80.16 weekly payments. *Rambo I*, 115 S. Ct. at 2146; see 33 U.S.C. 944(i)(2).[1]

3. After receiving that award, Rambo attended crane school and obtained longshore work as a crane operator. *Rambo I*, 115 S. Ct. at 2146. He worked steadily in that position, see Pet. App. 29a, and also worked as a heavy lift truck operator in his spare time. *Rambo I*, 115 S. Ct. at 2146. Between 1985 and 1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings, though his physical condition remained unchanged. *Ibid.*

In 1989, Metropolitan sought modification of the continuing award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, on the ground that Rambo's increased earnings represented a "change in conditions" such that he was no longer "disabled" under the Act. *Rambo I*, 115 S. Ct. at 2146. In 1991, a second ALJ agreed with Metropolitan and ended Rambo's disability payments. Pet. App. 26a-32a. The ALJ

[1] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the Longshore Act, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund during the preceding calendar year that are attributable to the employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

reasoned that modification may be based on a post-award change in a claimant's economic condition, *id.* at 28a-29a, and determined that Rambo's new skills and increased earnings constituted such a change, *id.* at 29a-31a. In particular, the ALJ found that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that Rambo's age, education, and vocational training placed him at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 30a-31a.

The Benefits Review Board affirmed. Pet. App. 21a-25a. The Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. *Id.* at 24a-25a. The Board also stated that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 25a.

4. The court of appeals reversed. Pet. App. 17a-20a. The court concluded that "only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 18a. In the view of the court of appeals, "[a] change in a claimant's wages, training, skills, or educational background is insufficient" to support a modification of an award. *Id.* at 18a-19a.

5. This Court reversed and remanded, holding that an award modification may be based on an increase in the employee's wage-earning capacity owing to the acquisition of new skills, even without any change in

his physical condition. *Rambo I*, 115 S. Ct. at 2147-2148, 2150. The Court explained that the Act's fundamental purpose is to compensate employees for wage-earning capacity lost because of injury, and that where that capacity has been reduced, restored or improved, the basis for compensation changes and the statute permits modification. *Id.* at 2148. The Court remanded the case to the court of appeals for consideration of other issues that had not been addressed on the initial appeal. *Id.* at 2150.

6. On remand, the court of appeals reversed the Benefits Review Board's order affirming the termination of Rambo's benefits and remanded for entry of a continuing nominal award. Pet. App. 2a-16a.[2] The court observed that under Section 22 of the LHWCA, 33 U.S.C. 922,

> a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus [*sic*] award, in effect, extends a claimant's right to modification indefinitely.

Pet. App. 11a. Because a continuing nominal award "is the only mechanism available to incorporate the possible future effects of a disability in an award determination," the court concluded, it is "an appropriate mechanism" for effectuating the Act's "'forward looking' perspective in considering whether a claimant has suffered a decline in wage-earning capacity." *Id.* at 13a.

The court of appeals also determined that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and that the Board had erred in affirming the ALJ's order. Pet. App. 13a. The court found that the ALJ had overemphasized Rambo's current status and had failed to consider the effect of his permanent partial disability on his future earnings. *Ibid.* Because, in the court's view, there remained a significant possibility that Rambo would eventually suffer economic harm as a result of his injury, a continuing nominal award was the appropriate modification. *Id.* at 14a.[3]

SUMMARY OF ARGUMENT

1. Section 8(h) of the LHWCA governs the determination of an injured employee's "wage-earning capacity" in cases of partial disability. The district director or ALJ is expressly authorized to consider, in the interest of justice, the likely future effects of a

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[2] The court of appeals held that it could consider the propriety of a nominal award despite the fact that Rambo had not specifically requested a nominal award before either the ALJ or the Benefits Review Board. Pet. App. 10a. The court relied on Board precedent holding that "[a] claim for total benefits includes any lesser degree of disability." *Ibid.* (quoting *Young v. Todd Pac. Shipyards Corp.*, 17 Ben. Rev. Bd. Serv. (MB) 201, 204 n.2 (1985)). The court concluded that "[b]y contesting downward modification of his award, Rambo was asserting his right to an award of any size." Pet. App. 10a.

[3] The court of appeals rejected Rambo's contention that the 1983 stipulation between himself and Metropolitan constituted a binding settlement of the claim that precluded a subsequent request for modification. See Pet. App. 8a-10a. Rambo has not challenged that ruling in this Court.

claimant's injury, and to "fix such wage-earning capacity as shall be reasonable" if the claimant's current earnings do not accurately reflect his long-term wage-earning capacity. Where the claimant demonstrates that his injury will more likely than not result in a loss of earnings at some point in the future, he has shown a loss of long-term wage-earning capacity, and has thereby established a "disability" within the meaning of the Longshore Act. Under such circumstances, if the claimant is not experiencing a current loss of earnings, entry of a continuing nominal award is the appropriate course of action because it accounts for the fact that the claimant's ability to compete in the open labor market has been impaired in the long term.

2. In the foregoing circumstances, a continuing nominal award is fully consistent with both the letter and the logic of Section 22 of the Longshore Act, which governs modification of award determinations. A Longshore Act claimant who demonstrates a likelihood of future economic harm as a result of a covered injury has established a "disability" within the meaning of the Act, and a consequent eligibility for LHWCA benefits. Where the threshold question of eligibility has been resolved in the claimant's favor, a continuing nominal award furthers the policies reflected in Section 22 by permitting subsequent modification in light of changes in the claimant's earnings.

The fact that a primary purpose of a nominal award is to prevent the triggering of Section 22's one-year limitations period does not mean that such an award is inappropriate. No generally applicable principle of law requires an adjudicator, in choosing between otherwise permissible alternatives, to ignore the effect that his choice will have on the application of statutory limitations periods. Under the Longshore Act, a district director or ALJ who finds that a claimant's current wages do not accurately reflect his long-term wage-earning capacity has broad authority to act, "in the interest of justice, [to] fix such wage-earning capacity as shall be reasonable." 33 U.S.C. 908(h). That authority easily includes the discretion to consider potential limitations consequences in determining whether a claimant who satisfies the statutory eligibility requirements should receive a nominal award.

The legislative history of the Longshore Act further supports the view that a district director or ALJ may properly take account of Section 22's one-year limitations period in determining the appropriateness of a continuing nominal award. That history indicates that in enacting Section 8(h)—and, in particular, its provision for consideration of "the effect of disability as it may naturally extend into the future"—Congress intended to mitigate the potentially harsh effect of Section 22's one-year limitation on modification requests. Benefit awards based on the likelihood of future economic injury were deemed appropriate, in substantial measure, *because* such awards would prevent the triggering of the one-year limitations period. Consideration of such consequences by a district director or ALJ is therefore consistent with congressional intent.

3. The court of appeals erred, however, in ordering a continuing nominal award in this case without further proceedings before the Benefits Review Board or ALJ. Consistent with the actions of other courts of appeals in similar circumstances, the court should have remanded the case for further pro-

ceedings to determine the likely effect of Rambo's injury on his long-term wage-earning capacity. Because Metropolitan bears the burden of proof on the issue, a continuing nominal award will be appropriate unless Metropolitan demonstrates that it is more likely than not that Rambo's injury will not cause a reduction of his earnings at some time in the future.

ARGUMENT

THE LONGSHORE ACT AUTHORIZES A CONTINUING NOMINAL AWARD WHEN A CLAIMANT HAS SHOWN NO PRESENT LOSS OF EARNINGS BUT HAS ESTABLISHED THAT HE IS LIKELY TO SUFFER SUCH A LOSS IN THE FUTURE AS A RESULT OF A COVERED INJURY

Under the Longshore Act, an employee engaged in maritime employment who is injured while working upon the navigable waters of the United States or adjoining maritime area is entitled to compensation "in respect of disability or death." 33 U.S.C. 903(a).[4] The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Longshore Act "does not compensate physical injury alone

[4] In addition to compensation, the Longshore Act requires the employer to furnish medical services and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). A claim for medical services may be made at any time, is not dependent on a showing of loss of wage-earning capacity, and is not affected by Section 22's limitations period governing applications to modify compensation orders or the denial of such orders. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 991 F.2d 163, 166 (5th Cir. 1993); *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108, 1116 (5th Cir.), cert. denied, 409 U.S. 887 (1972).

but the disability produced by that injury. Disability under the LHWCA, defined in terms of wage-earning capacity, is in essence an economic, not a medical concept." *Rambo I*, 115 S. Ct. at 2148 (citations omitted).

Compensation for earnings lost as a result of personal injury is not, of course, unique either to the LHWCA or to workers' compensation systems generally. Lost wages, including anticipated future lost wages, are a routine element of damages in tort actions involving personal injury. See Restatement (Second) of Torts § 924 (1979). The calculation of a one-time damages award in a tort action involves an estimation of "the difference between the earnings that the plaintiff probably would or could have received during his life expectancy but for the harm and the earnings that he will probably be able to receive during the period of his life expectancy as now determined." *Id.* at cmt. c (at 525-526).[5] The advantage of a one-time award is that it finally and definitively fixes the rights and obligations of the parties. The disadvantage lies in the inherently speculative nature of any attempt to forecast a chain of events that may extend for many years after the conclusion of the lawsuit.

Workers' compensation law reflects a quite different balance between the competing interests in finality and in precision—*i.e.*, in fashioning a compensation award that accurately reflects the extent of a claimant's disability as it may change over time. Every state workers' compensation code includes a provision for reopening and modifying awards when

[5] The amount of anticipated future losses is typically discounted to present value in order to prevent overcompensation. See Restatement (Second) of Torts § 913A.

the condition of the claimant has changed. See 3 Arthur Larson & Lex Larson, *The Law of Workmen's Compensation* § 81.10 (1996). Consistent with that approach, Section 22 of the Longshore Act provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * and * * * issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922. In *Rambo I*, this Court rejected Rambo's contention that the "change[s] in conditions" that would support the modification of an LHWCA award were limited to changes in the claimant's *medical* condition. 115 S. Ct. at 2147. Rather, the Court construed the phrase to permit modification based on a change in any condition that bears on the claimant's entitlement to benefits—*i.e.*, any condition that is relevant to the determination of wage-earning capacity. See *id.* at 2148 ("the applicable 'conditions' are those that entitled the employee to benefits in the first place, the same conditions on which continuing entitlement is predicated"); *id.* at 2150 ("a disability award may be modified under § 22 where there is a change in the employee's wage-earning capacity").

By comparison to the one-time awards characteristic of a tort regime, the LHWCA reflects a height-

ened concern for precision, and a diminished emphasis upon the prompt and final resolution of compensation disputes. The Act typically provides for periodic awards and permits modification based on changes in physical or economic conditions. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (LHWCA § 22 acts primarily as an exception to the normal rules of finality and res judicata, permitting the reopening of claims indefinitely and repeatedly, as long as the reopening occurs "prior to one year after the date of the last payment of compensation"); accord *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam). See also *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984) (LHWCA is designed "to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime").

In one respect, however, the Longshore Act scheme does sacrifice precision for finality. Where an application for benefits has been denied, Section 22 provides that a request for modification must be made "prior to one year after the rejection of a claim." 33 U.S.C. 922. As a result of that limitation, "[a]n initial finding of no economic disability * * * may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has suffered severe economic harm." *Hole* v. *Miami Shipyards*, 640 F.2d 769, 772 (5th Cir. 1981). On the other hand, "if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the com-

pensation award may be modified years later to reflect this greater or lesser economic injury." *Ibid.*

The position of the Director, OWCP, is that a continuing award of nominal benefits is proper whenever a claimant has suffered no present loss of earnings but has an injury that will, more likely than not, cause such a loss in the future. Such a claimant is disabled within the meaning of the Act because his ability to compete in the open labor market has been impaired, although the extent of his disability in terms of loss of wage-earning capacity is as yet indeterminate. Under those circumstances, a continuing norminal award is consistent with the statutory provisions governing eligibility for partial disability benefits; it neither conflicts with Section 22's one-year limitation on requests for modification nor subverts that Section's proper operation; and it furthers the effective administration of the statutory scheme taken as a whole.[6]

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[6] The Director, OWCP, acts pursuant to a delegation of authority from the Secretary, 20 C.F.R. 701.202(a), who has express authority to "administer" the LHWCA and "make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). The Director's interpretation of the Act is therefore entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1287 (1995) (Director "has full power" to supersede the decisions of the Benefits Review Board by issuing regulations setting forth her own construction of the LHWCA). See also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987) (Director's interpretation of regulations issued under the Black Lung Benefits Act is entitled to deference).

A. A CONTINUING NOMINAL AWARD IS APPROPRIATE WHEN A LONGSHORE ACT CLAIMANT ESTABLISHES THAT HIS INJURY WILL, MORE LIKELY THAN NOT, CAUSE A REDUCTION IN HIS EARNINGS AT SOME POINT IN THE FUTURE

1. Section 8(h) of the LHWCA governs the determination of an injured employee's "wage-earning capacity" in cases of partial disability. Section 8(h)—while providing as a general rule that wage-earning capacity is to be measured by actual earnings—states in addition that

> if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his *wage-earning capacity*, the [district director] may, in the interest of justice, fix such *wage-earning capacity* as shall be reasonable, having due regard to [various enumerated factors] including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h) (emphasis added).[7] Two features of that provision are particularly relevant here.

First, the portion of Section 8(h) quoted above uses the term "wage-earning capacity" in two different places. In making the ultimate determination of "wage-earning capacity," the district director or ALJ is expressly permitted to consider "the effect of disability as it may naturally extend into the future." In that context, the term "wage-earning capacity"

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[7] Other factors to be considered in setting compensation are "the nature of [the employee's] injury, the degree of physical impairment, [and] his usual employment." 33 U.S.C. 908(h).

plainly refers to *long-term* wage-earning capacity: the statutory authorization to consider the likely future effects of a claimant's injury would be meaningless if the district director or ALJ were required to fix "wage-earning capacity" solely by reference to the wages that the claimant is *currently* capable of earning.

Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), the term "wage-earning capacity" should be given the same construction in the previous clause of Section 8(h). Cf. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478-479 (1992) (the term "person entitled to compensation" has the same meaning throughout the LHWCA). Thus, Section 8(h) authorizes the district director or ALJ to consider anticipated future economic injury to the claimant not only in making the ultimate assessment of wage-earning capacity, but also in making the antecedent determination that the employee's actual earnings "do not fairly and reasonably represent his wage-earning capacity." In short, Section 8(h) places no restrictions on the authority of the district director or ALJ to take into account the employee's anticipated *future* earnings in determining whether the employee has suffered a "disability" within the meaning of the Act.

Second, where the district director or ALJ concludes that current earnings do not accurately reflect the claimant's wage-earning capacity, the Act does not impose a rigid formula governing the calculation of wage-earning capacity. In particular, the Act does not specify the manner in which wage-earning capacity is to be calculated when a claimant's future

earnings appear likely to be different from his present earnings. Rather, Section 8(h) confers broad discretion upon the district director or ALJ to act "in the interest of justice" by "fix[ing] such wage-earning capacity as shall be reasonable," having due regard for the specified factors. 33 U.S.C. 908(h).

The "interest of justice" standard permits the adjudicator to consider the likelihood that the claimant's earnings will be reduced at some time in the future due to his injury, even if he suffers no current loss of earnings. In a variety of circumstances, an adjudicator might reasonably determine that a decline in future earnings is likely even where the claimant suffers no current economic injury. For instance, the injured worker may be retained by a "beneficent" employer, willing to pay more than the employee's services would command in the open labor market. The claimant's injury may be such that his physical condition can be expected to deteriorate over time, with a consequent projected loss of earnings. An injured worker who is prevented from performing his prior job may obtain remunerative employment by acquiring other skills, yet may be at a significant disadvantage in the open labor market if demand for those skills declines in the future. In any of those situations, a claimant may be able to establish that he has suffered a loss of "wage-earning capacity" within the meaning of the Act even though his current earnings are not reduced.

2. a. The courts of appeals that have addressed the question have uniformly construed Section 8(h) to authorize a continuing nominal award under appropri-

ate circumstances.[8] The Fifth Circuit in *Hole* found that the claimant's higher post-injury earnings did not fairly and reasonably represent his earning capacity where he was unable to perform his pre-injury jobs, his post-injury managerial job was temporary, and his ability to transfer to a comparable position was uncertain. 640 F.2d at 771-772. The court concluded that a continuing nominal award was justified by the ALJ's conclusion "that there is a significant possibility that [the claimant] will at some future time suffer economic harm as a result of his injury." *Id.* at 772.

In *Randall*, the D.C. Circuit held that a continuing nominal award is appropriate "[w]hen it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of

[8] The Benefits Review Board has sometimes expressed disapproval of that practice. See *Mavar* v. *Matson Terminals, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 336, 338 (1988) ("The Board has repeatedly expressed its dissatisfaction with de minimis awards of benefits, viewing them as judicially created infringements upon the province of the legislature because they indefinitely extend the time period provided for modification by Section 22.") (citing cases). More recently, however, the Board has referred to such awards with apparent approval. See, *e.g.*, *Morin* v. *Bath Iron Works Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 205, 211 (1994); *Murphy* v. *Pro-Football, Inc.*, 24 Ben. Rev. Bd. Serv. (MB) 187, 191-192 (1991); *Burkhardt* v. *Bethlehem Steel Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 273, 277-278 (1990). Because the Benefits Review Board is an adjudicatory tribunal without administrative authority, its decisions receive no special deference from the courts. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

the economic injury unknowable." 725 F.2d at 800. The court found uncontroverted evidence that the claimant could no longer perform at his pre-injury level, that his higher-paying post-injury job was not permanent, and that his job opportunities were drastically reduced. *Id.* at 799-800. The court remanded for a determination whether there was sufficient uncertainty about the claimant's future economic harm to warrant a continuing nominal award. *Id.* at 800.

In *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (1989), the Second Circuit determined that a continuing nominal award is proper "where a physically impaired worker's potential right to compensation for the substantial loss of future earnings is a predictable probability, even if it is not a certainty at the time of hearing." The court found substantial evidence that the claimant was likely to suffer a future loss of earnings "as his condition deteriorates or when his environment changes," noting that he had suffered a progressive obstructive lung disorder, was restricted in performing some of his pre-injury job tasks, and was spared demanding physical exertion by the kindness of his employers and co-workers. *Ibid.* The court remanded for consideration by the ALJ as to the appropriate periodic payment. *Ibid.*[9]

[9] *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), is not to the contrary. The court in *Fleetwood* acknowledged that the entry of a nominal award to facilitate subsequent modification "may be appropriate in some cases." *Id.* at 1234 n.9. The court explained that "[t]he basis for such an award is found in Section 908(h) of the LHWCA, which provides that an ALJ shall 'fix such wage-earning capacity as shall be reasonable, . . . including the effect of disability as it may naturally extend into the future.'" *Ibid.*

b. The courts of appeals that have authorized continuing nominal awards, however, have been less than precise in stating the standard governing such awards. The Fifth and D.C. Circuits—like the Ninth Circuit in the instant case, see Pet. App. 14a—have endorsed nominal awards premised on a "significant possibility" of future economic harm. See *Hole*, 640 F.2d at 772; *Randall*, 725 F.2d at 800. The Second Circuit has stated that such an award is proper where future economic harm is a "predictable probability," but its approving citations to *Hole* and *Randall* suggest that it attached no significance to the difference between its formulation and that employed by the other courts. See *LaFaille*, 884 F.2d at 62.

In our view, the initial entry of a continuing nominal award based on the prospect of future economic injury is appropriate if, but only if, the district director or ALJ concludes that such injury is more likely than not to occur. The prerequisite to a partial disability award under Section 8(c)(21) is, of course, a "disability," defined by the Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Benefit determinations under the LHWCA are governed by the Administrative Procedure Act (APA), including its provision that "the proponent of a rule

(quoting 33 U.S.C. 908(h)). The court concluded, however, that "the need for a [nominal] award to protect a worker whose economic loss cannot be ascertained is not present in this case" because the claimant had "failed to present sufficient evidence for the ALJ to conclude that the degree of future economic harm is uncertain." 776 F.2d at 1234 n.9. Thus, the Fourth Circuit's refusal to order a nominal award in *Fleetwood* was based on its assessment of the facts before it, not on a legal conclusion that such an award would contravene the Act.

or order has the burden of proof." 5 U.S.C. 556(d); see 33 U.S.C. 919(d) ("any hearing held under [the LHWCA] shall be conducted in accordance with the provisions of" the APA). In *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994), the Court construed the pertinent statutory provisions to impose upon an LHWCA claimant the burden of persuasion—*i.e.*, "when the evidence is evenly balanced, the benefits claimant must lose." *Id.* at 2259. Thus, the prospect of a future loss of earnings will justify initial entry of a Longshore Act award if, but only if, the claimant carries his burden of proof by establishing that such a loss is more likely than not to occur.

The instant case, however, arises out of Metropolitan's request for termination of Rambo's benefits, rather than out of the entry of an initial award. Metropolitan, as the "proponent" of the proposed "order" terminating Rambo's benefits, bears the burden of proving that Rambo is unlikely to suffer a future loss of earnings as a result of his injury.[10] The basic question—whether Rambo will more likely than not suffer future economic harm—remains the same; but in this setting the claimant rather than the employer must prevail if the evidence is in equipoise.

[10] Metropolitan acknowledges that "[t]o modify benefits pursuant to Section 22, the LHWCA requires that the employer prove by a preponderance of the evidence that the economic disability no longer exists." Pet. Reply to Br. in Opp. 4.

B. A CONTINUING NOMINAL AWARD NEITHER CONFLICTS WITH THE ONE-YEAR LIMITATIONS PERIOD ESTABLISHED BY SECTION 22 NOR SUBVERTS THE EFFECTIVE IMPLEMENTATION OF THAT PROVISION

For the foregoing reasons, a Longshore Act claimant who establishes that he is more likely than not to suffer a future loss of earnings as a result of a covered injury has satisfied the statutory prerequisites for an award of benefits. Under those circumstances, a continuing nominal award does not conflict with the one-year limitation for modification requests established by Section 22, nor does it subvert the effective implementation of that provision. To the contrary, a rule that would preclude an award of benefits in that situation would frustrate the accomplishment of the Act's objectives.

1. A continuing nominal award in no way conflicts with the text of Section 22. That Section confers broad authority upon the district director or ALJ to modify a Longshore Act award, while providing that no request for modification may be made more than one year after compensation has been terminated or denied. Section 22 does not address the question whether a claim should be granted or denied in the first instance. That determination is governed by Section 2(10) (which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury") and Section 8(h) (which prescribes the approach to be used in determining a claimant's "wage-earning capacity"). See 33 U.S.C. 902(10), 908(h).

2. Nor are the policies reflected in Section 22 subverted by a continuing nominal award to a Longshore

Act claimant who demonstrates a likelihood of future economic injury. As we explain above, Section 22 sacrifices precision to finality in one important respect. Where a claimant is found not to be entitled to LHWCA benefits *at all*, a request for modification must be made within one year after the denial or it will thereafter be barred. Once the eligibility threshold has been crossed, however, Section 22 sacrifices finality to precision by permitting subsequent increases or decreases in order to ensure that the amount of the award continues to reflect the claimant's wage-earning capacity.

A Longshore Act claimant who demonstrates a likelihood of future economic harm as a result of a covered injury has established a "disability" within the meaning of the Act, and a consequent eligibility for LHWCA benefits. Where the threshold question of eligibility has been resolved in the claimant's favor, concern for finality cannot justify outright denial of the claim. To the contrary, a continuing nominal award to a claimant who has been found to be eligible for benefits is consistent with both the letter and the logic of Section 22, since it permits subsequent modification in light of any changes in the claimant's wage-earning capacity.

3. The fact that a primary purpose of a nominal award is to prevent the triggering of Section 22's one-year limitations period does not mean that such an award is inappropriate.[11] The rule we advocate does

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[11] The courts that have addressed the question have uniformly concluded that continuing nominal awards are appropriate precisely *because* they prevent the triggering of Section 22's one-year limitation on requests for modification. See *Hole*, 640 F.2d at 773; *Randall*, 725 F.2d at 800; *LaFaille*, 884 F.2d at 62; Pet. App. 13a-14a.

not, we emphasize, permit an award of benefits to a claimant who fails to demonstrate a "disability" within the meaning of the Act. An employee who seeks a partial disability award pursuant to 33 U.S.C. 908(c)(21) must demonstrate, by a preponderance of the evidence, a present or future "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). But where a claimant demonstrates a "disability" based on a likely future loss of earnings, the decision to award nominal benefits may properly be informed by consideration of the statutory scheme taken as a whole, including both the availability of subsequent modification and the timing requirements applicable to modification requests.

No generally applicable principle of law requires an adjudicator, in choosing between otherwise permissible alternatives, to ignore the effect that his choice will have on the application of statutory limitations periods.[12] Nor does the text of the LHWCA constrain the adjudicator's discretion in this regard. To the contrary, where the district director or ALJ finds that a Longshore Act claimant's current wages do not accurately reflect his long-term wage-earning capacity, the adjudicator has broad authority to act, "in the interest of justice, [to] fix such wage-earning capac-

[12] This Court has recognized, for example, that when a federal court declines to adjudicate a lawsuit due to the pendency of a parallel state proceeding, a stay rather than a dismissal of the federal suit "will often be the preferable course, insofar as it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 n.2 (1995); accord *Deakins* v. *Monaghan*, 484 U.S. 193, 202-203 & n.7 (1988).

ity as shall be reasonable." 33 U.S.C. 908(h). That authority readily includes the discretion to consider potential limitations consequences in determining whether a claimant who satisfies the statutory eligibility requirements should receive a nominal award.

Indeed, in light of the Longshore Act's goal of compensating for disability due to work-related injury, the broad discretion conferred by the Act can be properly exercised *only* if the adjudicator is cognizant of the totality of the statutory scheme. Suppose, for example, that the Longshore Act, like common law tort judgments, contained no provision for modification of awards—*i.e.*, that a claimant in a partial disability case would continue to receive the same amount of benefits for the duration of his lifetime regardless of any change in circumstances. It might then be appropriate to award *greater than nominal* benefits to a claimant who showed no reduction in current earnings but proved a likelihood of future economic injury, so that the benefits paid over the claimant's lifetime would ultimately compensate him for the anticipated future harm. In light of the availability of modification under Section 22, however, such an award would overcompensate the claimant: having received an initial award designed to compensate for anticipated future economic injury, the employee could in effect obtain a second recovery by requesting an increase in the amount of benefits if and when the harm materialized. In "fix[ing] such wage-earning capacity as shall be reasonable," 33 U.S.C. 908(h), a district director or ALJ should surely take cognizance of the statutory scheme as a whole, including the claimant's ability to request a subsequent increase in the award pursuant to Section 22. It is equally appropriate for the district director

or ALJ to take account of Section 22's one-year limitations period in deciding whether to issue a nominal award rather than no award at all.[13]

4. The legislative history of the Longshore Act further supports the view that a district director or ALJ may properly take account of Section 22's one-year limitations period in determining the appropriateness of a continuing nominal award. Section 8(h) was added to the Longshore Act in 1938. See the Longshoremen's and Harbor Workers' Compensation Act Amendments, ch. 685, § 5, 52 Stat. 1165. The pertinent committee reports explained that Section 8(h) would

> provide[] for consideration of the effects of an injury causing permanent partial disability, upon the employee's future ability to earn. * * * Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful em-

[13] Except in cases involving "occupational disease[s]," 33 U.S.C. 913(b)(2), the LHWCA provides that a claim for disability compensation is barred unless it is filed "within one year after the injury." 33 U.S.C. 913(a). The time for filing a claim begins to run when the employee "is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury * * * and the employment." *Ibid.* Thus, if an injured employee experiences no reduction in current earnings but "has been put on the alert * * * as to the likely impairment of his earning power," the Longshore Act does not generally permit him to defer the filing of his claim until the economic harm materializes. *Stancil* v. *Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970); accord *Duluth, M. & I. R. Ry.* v. *Director, OWCP*, 43 F.3d 1206, 1208 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Parker*, 935 F.2d 20, 24-27 (4th Cir. 1991).

> ployment definitely limited. * * * It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.
>
> In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage-earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the act with respect to the filing of claim for compensation and right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.

H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

The legislative history thus indicates that in enacting Section 8(h)—and, in particular, its provision for consideration of "the effect of disability as it may naturally extend into the future"—Congress intended to mitigate the potentially harsh effect of Section 22's one-year limitation on modification requests. Benefit awards based on the likelihood of future economic injury were deemed appropriate, in substantial measure, *because* such awards would prevent the triggering of the one-year limitations period. Consideration of such consequences by a district director or ALJ is therefore fully in accord with congressional intent.

Congress has continued to recognize the interrelation of Sections 8(h) and 22. In 1983, committees of both the House of Representatives and the Senate proposed amendments to the Longshore Act that would have eliminated both the provision for consideration of the future economic effects of disability in Section 8(h), and the one-year limitations period in Section 22. See H.R. Rep. No. 570, 98th Cong., 1st Sess. 27-28, 47, 61 (1983); S. Rep. No. 81, 98th Cong., 1st Sess. 36-38, 60, 73 (1983). In proposing those changes, the Senate Committee noted the prevailing practice under which ALJs awarded "benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified." S. Rep. No. 81, *supra*, at 38. The committee stated that under the proposed statutory amendments, "[r]equests for modification will no longer be necessary simply to keep the statute of limitations from running." *Ibid.* Although the LHWCA was amended in other significant respects

the following year, see Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1644, neither the provision for consideration of the future economic effects of disability in Section 8(h) nor the one-year limitations period in Section 22 was altered. Congress's decision to retain those provisions, despite its awareness of the ALJs' practice of making continuing nominal awards "simply to keep the statute of limitations from running," indicates that Congress regarded such awards as consistent with the statutory scheme.

C. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN ORDERING A CONTINUING NOMINAL AWARD IN THIS CASE

For the foregoing reasons, we believe that entry of a continuing nominal award is appropriate where an LHWCA claimant suffers no reduction of current earnings but establishes the likelihood of a future economic loss as a result of work-related injury. In the instant case, however, the court of appeals erred in ordering such an award without further fact-finding by the ALJ. As the court itself recognized, its role is limited to review of the decisions of the Benefits Review Board for errors of law and adherence to the substantial evidence standard. Pet. App. 7a. The Board reviews the ALJ's factual findings under the same standard. 33 U.S.C. 921(b)(3).

The second ALJ terminated Rambo's original award on the basis of his findings that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that Rambo's age, education, and vocational training placed him at no greater risk of

losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. Pet. App. 30a-31a. The court of appeals concluded that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and it criticized the ALJ for not considering the effect of Rambo's permanent partial disability on his future earnings. *Id.* at 13a. Instead of remanding for such consideration, however, the court approved a nominal award on the basis of the uncontroverted facts (see *id.* at 27a, 29a-31a) that Rambo's disability reduced his ability to do his previous work; that his physical condition had remained unchanged since his accident; and that he did not know how long his higher-paying post-injury job would last. *Id.* at 13a.

The facts cited by the court of appeals were insufficient to justify its apparent conclusion that no reasonable ALJ could have declined to order a continuing nominal award. In ordering such an award, the court of appeals therefore exceeded its authority by engaging in its own fact-finding and reweighing of known facts. Consistent with the actions of other courts of appeals in similar circumstances, the court should have remanded this case for further proceedings to determine the likely effect of Rambo's injury on his future earnings. See *LaFaille*, 884 F.2d at 62 (leaving to the ALJ the Section 8(h) determination of the appropriateness of a nominal award); *Randall*, 725 F.2d at 799, 800 (determination regarding the propriety of a nominal award is properly left to the ALJ,

who must make explicit findings on all relevant statutory factors).[14]

This Court should therefore reverse the judgment of the court of appeals and remand the case, with instructions that the case be further remanded to the Benefits Review Board to consider the propriety of a continuing nominal award. If the Board concludes that a hearing is necessary, it may further remand the matter to an ALJ. Because Metropolitan bears the burden of proof on the issue, see page 23, *supra*, a continuing nominal award will be appropriate unless Metropolitan demonstrates, by a preponderance of the evidence, that Rambo's injury will not cause a loss of earnings at any time in the future.

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[14] The ALJ was not asked to consider, and did not determine, whether a continuing nominal award would be appropriate. He therefore made no findings concerning the likelihood that Rambo's physical injury would again result in economic disability in the event that he is unable (for whatever reason) to keep his current employment. As noted above, see note 2, *supra*, the court of appeals concluded that it could consider the propriety of a nominal award even though Rambo had not specifically requested such an award from either the ALJ or the Benefits Review Board. The petition for a writ of certiorari does not challenge that aspect of the court's decision. We therefore believe that any waiver argument that Metropolitan might have asserted has itself been waived.

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the court of appeals with instructions that it be further remanded to the Benefits Review Board for further proceedings regarding the appropriateness of a continuing nominal award.

Respectfully submitted.

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JANUARY 1997

APPENDIX

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
211 MAIN STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94105

CASE NO. 83-LHC-242

OWCP NO. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge

DECISION AND ORDER— AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section

references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.25 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 30, 1981. That the date of November 16, 1981, is the appropriate date for the commence-

ment of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by

the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions—§908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ JAMES J. BUTLER
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm